88-705

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1988

EARL L. JONES,

Petitioner,

v.

THE STATE OF NEW MEXICO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the particularity requirement of the Fourth Amendment was violated by issuance of a search warrant which authorized the seizure of Petitioner's business records, including "invoices, inventory cards, checkbooks, bank records to include cancelled checks, and any other records that show items bought or sold in the operation of" Petitioner's business, where the supporting affidavit alleged that he had purchased stolen property on numerous occasions, and that illegal transactions were recorded in red ink on inventory cards, while legal transactions were recorded in black ink?

II.

Whether the New Mexico Court of Appeals incorrectly applied a standard of "practical margin of flexibility" in reversing the trial court's suppression of evidence seized pursuant to a warrant the trial court characterized as "general" when the supporting affidavit neither alleges that Petitioner had developed a complex criminal scheme, nor supports the reasonable inference that the purchase of stolen property was complex or concealed?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Cases and Authorities iii

Opinion Below 1

Jurisdiction 1

Constitutional Provisions 1

Statement of the Case 2

Reasons for Granting the Writ 3

Conclusion 14

Appendix

Exhibit A: Opinion of New Mexico Court of Appeals A-1

Exhibit B: Order of New Mexico Supreme Court denying Petition for Writ of Certiorari A-9

Exhibit C: Order of New Mexico Supreme Court denying Motion for Rehearing A-10

Exhibit D: Search Warrant and Return A-11

Exhibit E: Affidavit for Search Warrant A-15

Exhibit F: Trial court order suppressing evidence seized pursuant to search warrant A-21

TABLE OF CASES AND AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS

Andresen v. Maryland, 427 U.S. 463 (1976).....7, 12, 15

Coolidge v. New Hampshire, 403 U.S. 443 (1971).....5

Marron v. United States, 275 U.S. 192 (1927).....7

Stanford v. Texas, 379 U.S. 476 (1965).....7

UNITED STATES CIRCUIT COURTS OF APPEALS DECISIONS

In re Grand Jury Proceedings, 716 F.2d 493 (8th Cir. 1983).....10

United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982) 10

United States v. Roche, 614 F.2d 6 (1st Cir. 1980) 10

United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).....11, 12, 13

Voss v. Bergsgaard, 774 F.2d 402 (10th Cir. 1985)...9-10, 13

OPINION BELOW

The opinion of the New Mexico Court of Appeals is scheduled for publication, but does not yet appear in the official or unofficial reports. A copy of the opinion is appended to this petition as Exhibit A.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). The opinion of the New Mexico Court of Appeals was delivered on June 28, 1988. Petitioner's application for a writ of certiorari was denied by the New Mexico Supreme Court on August 9, 1988, (Exhibit B), and his motion for rehearing in the state supreme court was denied on August 26, 1988. (Exhibit C). This petition is timely if filed on or before October 25, 1988.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner stands charged by information in New Mexico District Court with three felony counts of receiving stolen property. The information flows from allegations made by an oil field roustabout that he sold stolen oil field connections to Petitioner, who operates an oil field supply business, Chaveroo Supply Company. The roustabout admitted he stole property from Phillips Petroleum Company and sold it to Petitioner for a fraction of its value, assuming that because of the low price Petitioner understood the property to have been stolen. These allegations were detailed in an affidavit for search warrant which resulted in issuance of a warrant and seizure of certain items of evidence by state officers. The affidavit is appended to this petition as Exhibit E. The warrant and completed return are appended as Exhibit D.

In addition, a former employee of Chaveroo provided police with information, also detailed in the affidavit supporting the search warrant, which showed that Petitioner had engaged in numerous purchases of stolen oil field property over the seven year period during which he worked for Chaveroo. These purchases of stolen property were recorded in red ink on inventory cards kept by Petitioner in the course of his business. The informant told officers that lawful transactions were recorded in black ink and that the inventory cards were so mixed that Petitioner could not destroy the records of illegal transactions without difficulty, even though he knew that a criminal investigation was being undertaken. (Exhibit E at A-18).

Petitioner's trial counsel filed a motion to suppress evidence seized pursuant to the warrant, arguing that the search warrant was impermissibly broad and general in nature, contravening the requirement of particularity. Upon hearing, the trial court suppressed the evidence, finding that the warrant was a general warrant which violated the Fourth Amendment to the federal constitution. The trial court's order is appended to this petition as Exhibit F.

Following the suppression, the State moved for interlocutory appeal under New Mexico rules and the New Mexico Court of Appeals reversed the trial court ruling in an opinion scheduled for publication. (Exhibit A). The court of appeals concluded that the warrant was not impermissibly broad and that the complexity of Petitioner's criminal scheme justified relaxation of the particularity requirement in the issuance of the search warrant. Petitioner's application for review addressed to the New Mexico Supreme Court was denied and the supreme court denied his motion for rehearing.

REASONS FOR GRANTING THE WRIT

The New Mexico Court of Appeals has sanctioned the use of an impermissibly broad warrant for the search of business records in its published opinion. Because the tenor of the opinion below suggests profound consequences for the conduct of criminal investigations into corporate criminal activity and white collar crime, the Court should review the decision of the New Mexico

court to determine whether the warrant issued in Petitioner's case was sufficient to meet Fourth Amendment standards for specificity in the designation of items and evidence to be seized and whether, if such a broad warrant may be authorized in appropriate cases the underlying factual allegations in the search warrant affidavit here were fully supportive of the warrant issued.

I.

In reversing the trial court's determination that the warrant issued in Petitioner's case was a "General Warrant in violation of the Fourth Amendment," (Exhibit F, order of trial court), the state appellate court held that "where the complexity of the criminal investigation requires piecing together of a number of items of evidence that may not be incriminating when taken alone, the fourth amendment prohibition against unreasonable searches and seizures must be applied with a practical margin of flexibility." (Exhibit A at A-2). Applying this principle to Petitioner's case, that court concluded that the warrant was sufficiently specific to meet constitutional standards in light of information contained in the supporting affidavit.

The warrant issued in this case is a form document authorizing a search of the premises or person specified during the hours from 6:00 a.m. to 10:00 p.m. It also purports to incorporate the supporting affidavit as a part of the warrant. (Exhibit D at A-11). No greater specificity for the execution of the warrant is set forth than that which incorporates the underlying affidavit in the warrant itself. The supporting affidavit requested authority

to search both Petitioner's business and his residence for the following items:

> Chaveroo Supply invoices, inventory cards, checkbooks, bank records to include cancelled checks, and any other records that show items bought or sold in the operation of Chaveroo Supply Company.

(Exhibit E at A-15).

The court of appeals concluded that this description of items to be seized was not impermissibly broad, or general, finding that the warrant "did not authorize seizure of all of Chaveroo's business records." Instead, that court found that the warrant was restricted as to the records seized and did not permit seizure of records not reasonably related to the alleged purchase and resale of stolen property. (Exhibit A at A-6).

The court then characterized the criminal activity under investigation as "complex," thus justifying application of a "practical margin of flexibility, taking into account the manner in which the defendant allegedly set up the scheme and the nature of the seized items" in evaluating the particularity required for the warrant. (Exhibit A at A-5).

The warrant issued here was an impermissibly general search warrant because it failed to particularly describe the items or evidence to be seized, as required by the Court in *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). Contrary to the state court's conclusions, the language of the warrant itself does not confine the actual seizure of evidence to business records related to the alleged criminal activity. In fact, the warrant authorized the police to seize virtually all the business records of this

Petitioner, including records of a personal nature which could have been located at his residence, according to the terms of the warrant. Instead of providing that the police could seize invoices, inventory cards, checkbooks and bank records including cancelled checks which relate to the purchase and resale of used property, the warrant specifically authorized the police to seize all invoices, inventory cards, checkbooks and bank records *and any other records that show items bought or sold in the operation of Chaveroo Supply Company.* (Exhibit E at A-15).

Consequently, rather than restricting the seizure of business records to those which might logically relate to the "scheme" set forth in the supporting affidavit, the warrant grants unlimited authority to seize business records, particularly including checkbooks and bank records, and additional authority to seize other records which reflect purchases and sales of property. In contrast to the interpretation placed upon this warrant by the New Mexico Court of Appeals, the police were permitted to conduct a general search of Petitioner's business records, including records which might be located at his home, without limitation. The warrant authorized seizure of all inventory cards and invoices without limitation as to the type of property purchased, ordered or sold, and all checkbooks and bank records, including cancelled checks. No limitation is placed upon the seizure of these records, whether taken from Petitioner's place of business or his residence. In addition to those types of records specifically subject to seizure, the magistrate then authorized the seizure of other records which might have evidentiary value based on the allegations in the supporting affidavit.

The warrant is impermissibly general in nature because it authorized a general seizure of business records from Petitioner's business and home. While the state court premised its decision on reliance on this Court's decision in *Andresen v. Maryland*, 427 U.S. 463, 481, n. 10 (1976), the description of items and evidence to be seized set forth in the *Andresen* footnote is a model of particularity by comparison. The warrant in *Andresen* specifically limited the items to be seized to those reasonably related to the offense under investigation. Then, it set forth a detailed list of documents subject to inclusion within the ambit of the investigation, including a reference to particular parties involved in the transaction under investigation.

The warrant scrutinized by the Court in *Andresen* truly did not leave anything to the discretion of the investigating officer who executed the warrant, following the expression of the Court in *Stanford v. Texas*, 379 U.S. 476, 485 (1965). The court below concluded that the warrant in the instant case similarly must meet the requirement of *Stanford* and *Marron v. United States*, 275 U.S. 192, 196 (1927), but wholly failed to address the discretion the warrant actually vested in the executing officers to determine what other records, if any, found at either Petitioner's office or home were relevant to the prosecution. Unless the officers did exercise discretion with respect to what items should be seized, the warrant authorized them to seize all checkbooks and bank records, whether they were relevant to the matters under investigation or not.

Moreover, the court below concluded that the warrant was not general because it would have been unreasonable to limit the search to documents which showed criminal activity, based on the affidavit's reference to the actual means by which these items were recorded in the Chaveroo Supply Company inventory. The information disclosed by the affidavit shows that an employee of the company had told officers that stolen property was recorded in red ink on inventory cards, while legitimately purchased property was recorded in black ink. (Exhibit E at A-18). The court rejected Petitioner's argument that the warrant should, therefore, have been limited to the seizure of inventory cards recording transactions in red ink. Instead, the court concluded that all records were subject to seizure because the legitimate transactions (black ink) would be admissible to show both the existence of the scheme and comparative value of property purchased which had not been stolen.

Consequently, even following the analysis of the court of appeals, the warrant was general because it authorized seizure of *all* records, rather than those records (red ink) which showed evidence of the crime alleged by the informant which was related in the affidavit for the warrant.

The affidavit contains two fairly simple allegations: first, that a former oil field roustabout claims to have sold stolen oil field equipment to Petitioner's company; and second, that an employee of the company claimed that Petitioner had bought and sold stolen equipment over a period of years. The roustabout concluded that Petitioner should have known the equipment he sold had been stolen because of the low price charged. The employee

related that stolen property had been recorded in red ink on inventory cards, while legitimate transactions were recorded in black ink. The employee had further stated that there were so many transactions that it would have been difficult for Petitioner to alter these records even though Petitioner "is aware the investigation is in progress." (Exhibit E at A-18). The employee also stated that Petitioner had told him that his purchase of stolen equipment could never be proved because of the way in which his "business was set up." (Exhibit E at A-19).

The warrant issued for seizure of all records was clearly excessive in light of the facts disclosed in the underlying affidavit. The seizure of all records, including all checkbooks and bank records from the business or residence of Petitioner, was simply designed to permit investigating officers to conduct a general, exploratory search for evidence of crime. A properly drawn affidavit would not have permitted seizure of records admittedly relating only to lawful transactions. The affidavit discloses that the informant gave officers a simple key to seizure of records of illegal transactions: stolen property transactions were recorded in red ink, rather than black ink.

In permitting the executing officers to seize all invoices, inventory cards, checkbooks and bank records, including cancelled checks, as well as any other records relating to the purchase or sale of items by Chaveroo Supply, the warrant effectively permitted the seizure of all business records of this oil field supply company. Such warrants, which permit seizure of all records, whether relevant to specified criminal activity or not, have been held invalid by appellate courts. *Voss v. Bergsgaard*, 774

F.2d 402, 406 (10th Cir. 1985); *United States v. Roche*, 614 F.2d 6, 7 (1st. Cir. 1980); *United States v. Cardwell*, 680 F.2d 75, 77-79 (9th Cir. 1982); and *In re Grand Jury Proceedings*, 716 F.2d 493, 498-499 (8th Cir. 1983).

The court of appeals concluded that the warrant did not authorize seizure of all of Petitioner's business records because it did not authorize the executing officers to seize records dealing with "personnel, payroll, taxes, insurance, worker's compensation, or social security." (Exhibit A at A-6).

This is an interesting approach, because it ignores the fact that seizure of all of Petitioner's checkbooks and bank records would necessarily include seizure of records relating to the financial aspect of those matters. Further, to the extent that the executing officers might have concluded that these unrelated matters bore on purchase or sale of items by Chaveroo Supply, these matters would have been subject to seizure under the express terms of the warrant, even though the searching officers might have been incorrect in their determination. Finally, the warrant did authorize seizure of the records which relate to the principal activities of Petitioner's business, the sale of oil field equipment, regardless of the connection of these records to allegedly illegal transactions.

Here, the warrant was overbroad because it failed to limit seizure to the specific records – as set forth in the information related in the supporting affidavit – which would allegedly document illegal transactions, the inventory cards on which information was recorded in red ink. The warrant did not limit the exercise of discretion by the executing officers; instead, it vested discretion in the

officers to make decisions regarding which records might bear on purchases and sale of items by Petitioner's company. Further, it authorized seizure of all checkbooks and bank records, including cancelled checks, from both Petitioner's place of business and residence, despite the fact that there was no information set forth in the affidavit suggesting that Petitioner kept any records at his home relevant to the transactions under investigation.

The New Mexico Court of Appeals erred in reversing the trial court's judgment that the warrant issued in this case was general in nature, violating the particularity requirement of the Fourth Amendment.

II.

In holding that the warrant was sufficiently particular under the requirements of the Fourth Amendment, the state court expressly held that the particularity requirement is to be applied with "a practical margin of flexibility" where the circumstances demonstrate a complex scheme of illegal activity. The court relied on the Eleventh Circuit's decision in *United States v. Wuagneux*, 683 F.2d 1343, 1349-1350 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). *Wuagneux* dealt with a complex scheme of fraud and tax evasion involving racketeering which included a significant series of kickbacks being paid through sham corporations.

In contrast to the obviously complex scheme which characterized the criminal activity in *Wuagneux*, the affidavit supporting the search warrant in Petitioner's case does not disclose a sophisticated or complex criminal enterprise. The affidavit shows that Petitioner is accused

of buying stolen oil field equipment over a period of years, recording the tainted transactions in red ink, as opposed to the usual black ink for legitimate transactions and reselling the equipment. Moreover, the affidavit showed that the police investigating this illegal activity were supplied with a record of transactions involving the roustabout who admitted the theft of oil field connections and subsequent sale to Petitioner. (Exhibit E A-17-18). Although the former employee/informant related that he could not remember the total number of transactions engaged in by Petitioner over a seven year period, he did relate that the "red ink" record system could not be successfully destroyed by Petitioner because of its inter-relationship with Petitioner's legal inventory.

Nothing in the affidavit suggests or alleges that the scheme in which Petitioner is charged demonstrates the type of complexity or concealment which justified the issuance of a broad warrant in *Wuagneux* or *Andresen*. Instead, both the scheme and the record keeping are remarkably simple. There was no averment in the affidavit that demonstrated the use of other business entities or sham corporations, fraudulent invoices, or other paperwork which would conceal the transactions once an investigator understood the significance of the use, if any, of red ink in the recording of certain transactions. The informant did claim that Petitioner had told him that no one could prove he had bought stolen equipment because no one knew how his business was set up. While the court of appeals found this apparent statement against interest compelling, the fact is that the informant was confident that he had disclosed the entire record-keeping system to the officers and that "it would be difficult" for

Petitioner to alter the system even knowing that an investigation was in progress. (Exhibit E at A-19). In short, far from being a complex scheme, the affidavit shows the existence of not only a simplistic scheme, but one completely disclosed in the supporting affidavit.

To the extent that the opinion below concedes a lack of particularity based on the rationale that the complexity of Petitioner's alleged criminal activity justified "a practical margin of flexibility," *Wuagneux* at 1349, in the drafting of the warrant, that conclusion is subject to review. Petitioner argues that if such flexibility is appropriate in certain cases, then the supporting affidavit must either allege the complexity which justifies liberality in the drafting of the warrant, or facts sufficient to support a conclusion of complexity should be included in the affidavit. Here, neither the averments nor the facts related in the affidavit show that Petitioner engaged in a complex criminal scheme or enterprise. Certainly, the facts are insufficient to show that the alleged criminal activity permeates Petitioner's entire business, or that the business serves as nothing more than a "front" for illegal activity. *See Voss v. Bergsgaard*, 774 F.2d at 406.

The warrant issued by the magistrate was not supported by an affidavit which justified the conclusion that Petitioner was engaged in such a complex or concealed scheme of activity that broad authority to seize all records of Petitioner's business activity, as opposed to all records which might have been kept in the course of business, was necessary to develop evidence for prosecution. In fact, the State could have obtained the evidence supporting the allegations made by the roustabout and informant by seizing the inventory cards coded in red

ink, if any. One might speculate on how any scheme of illegal activity could have been more simply conducted – at least for purposes of investigation – than one in which all illegal transactions were highlighted by red ink.

Contrary to the conclusion reached by the New Mexico Court of Appeals, the impermissibly broad warrant issued in this case was not justified by any evidence of a complex or concealed scheme of criminal activity. Thus, the warrant should stand on its face as to the particularity of the items designated for seizure, rather than with the "practical margin of flexibility" employed by the court below.

CONCLUSION

The opinion of the New Mexico Court of Appeals incorrectly holds that a warrant authorizing seizure of all records of Petitioner's business transactions was justified or necessary to develop evidence that some transactions were illegal. Because the court characterized the alleged criminal activity as "complex," without support for this conclusion either by direct allegation or reasonable inference from the information related in the supporting affidavit, the decision departs from those well-reasoned cases in which complex criminal activity will justify issuance of a warrant admittedly broad in its authority for seizure of business records. Although the alleged purchase of stolen property was purportedly channelled through a business, that fact alone does not support the conclusion that a complex criminal scheme had been developed.

Petitioner prays the Court issue the writ of certiorari to review the judgment of the New Mexico Court of Appeals, and upon review, reverse or order the judgment below vacated in light of *Andresen v. Maryland, supra.*

Respectfully submitted,

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EXHIBIT A:
OPINION OF NEW MEXICO COURT OF APPEALS

FROM THE NEW MEXICO COURT OF APPEALS

STATE OF NEW MEXICO,
Plaintiff-Appellant,

versus

EARL L. JONES,
Defendant-Appellee.

No. 10,348 (filed June 28, 1988)

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
PATRICK J. FRANCOEUR, District Judge

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OPINION

WILLIAM W. BIVINS, Judge.

The state appeals a district court order supressing all evidence seized pursuant to a search warrant. The sole issue is whether the district court erred in its determination that the search warrant issued constituted a general search warrant and, therefore, violated the fourth amendment to the United States Constitution. We hold that where the complexity of the criminal investigation

requires piecing together a number of items of evidence that may not appear incriminating when taken alone, the fourth amendment prohibition against unreasonable searches and seizures must be applied with a practical margin of flexibility. When so applied here, we determine the search warrant proper and reverse.

The affidavit for search warrant, made by an undersheriff, recites that the Tatum police received information that defendant, the owner of Chaveroo Supply, Inc. (Chaveroo), an oil field supply business, had purchased a large quantity of new connections from a roustabout at a fraction of their retail value (11%). Defendant paid for these items by check. It further states that the roustabout had confessed to stealing the connections from Phillips Petroleum Company. The affidavit continues that defendant's knowledge of the value of new connections, coupled with the small amount paid to someone who would not be expected to own a large quantity of new connections, suggested that defendant knew the items had been stolen.

The affidavit also recites that the criminal investigation had been initiated based on statements of an employee of Chaveroo, who had seen a list of the connections purchased from the roustabout. The list was in defendant's handwriting and showed the retail value, wholesale value, and the amount paid. The employee provided a photocopy of the list. The Chaveroo employee stated that the connections had been "placed into the new stock and posted into company inventory cards by Earl Jones," the defendant. The employee said that, during the seven years he worked at Chaveroo, defendant had purchased stolen oil field connections so many times from

different sources that the employee could not even estimate the number. He also said that information as to stolen items would be posted in red ink, whereas information concerning items acquired through legitimate sources would be posted in black ink and would include a purchase order number or invoice number. The employee said defendant had told him that no one could ever prove he bought stolen property because of the way his business was "set up."

Based on this information, a magistrate issued a search warrant for "Chaveroo Supply [sic] invoices, inventory cards, checkbooks, bank records to include cancelled checks, and any other records that show items bought or sold in the operation of Chaveroo Supply Company." The search warrant was not limited to time. Acting under this search warrant, the sheriff seized business records of Chaveroo. Defendant moved to suppress all evidence seized by the state.

The fourth amendment provides that "no Warrants shall issue, but upon probable cause . . . and particularly describing the . . . things to be seized." This appeal concerns the particularity requirement. The fourth amendment, made applicable to the states through the fourteenth amendment, prohibits states from using general search warrants that do not describe with particularity the things to be seized. **Stanford v. Texas**, 379 U.S. 476 (1965). "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." **Marron v. United States**,

275 U.S. 192, 196 (1927). This requirement is aimed at preventing "general, exploratory rummaging in a person's belongings." **Coolidge v. New Hampshire**, 403 U.S. 443, 467 (1971).

The Supreme Court has, however, recognized that a complex criminal investigation may require piecing together "[l]ike a jigsaw puzzle" a number of items of evidence that may not appear incriminating when taken alone. **Andresen v. Maryland**, 427 U.S. 463, 481, n.10 (1976). "The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession." **Id.**

We hold that the state has demonstrated probable cause to believe defendant was engaged in criminal activity and probable cause to believe that evidence of the crime was in defendant's possession. Based on the roustabout's statement that he sold stolen equipment to defendant at a greatly reduced price and an employee's statement that defendant purchased stolen equipment on numerous occasions, the affidavit provided probable cause to believe defendant had committed the crime of receiving stolen property. Based on the employee's statement that defendant kept track of the stolen equipment by making entries into his inventory records, probable cause existed to believe that defendant's business records contained evidence of defendant's having received stolen property.

As the court in **United States v. Wuagneux**, 683 F.2d 1343, 1349 (11th Cir. 1982), **cert. denied**, 464 U.S. 814

(1983), noted: "It is universally recognized that the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and that a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit." We believe the case before us meets that criteria.

Because of the complexity of defendant's scheme, it was not possible to identify which particular documents contained evidence of criminal activity. Statements by defendant's employee demonstrate that records containing evidence of criminal activity were inseparably mixed with inventory records of legitimate business transactions. Under the circumstances it would have been practically impossible for officials to describe the incriminating documents with greater specificity than provided in the search warrant. Moreover, defendant himself had bragged about the difficulty anyone would encounter in trying to prove he had bought stolen property, because of the measures he had taken to avoid detection.

Defendant argues that the search warrant could and should have described the items with far more specificity. We disagree. First, to limit the search warrant to inventory cards marked with red ink, as defendant suggests, would be meaningless. The criminal nature of the records could be shown only by comparing the inventory cards written in red ink with the legitimate cards written in black ink. The affidavit recites that defendant paid eleven percent of value for the stolen property. In order to demonstrate this, it would be necessary to compare the stolen inventory items with similar items in the legitimate

inventory. A similar comparison would be required as to the sources of acquisition.

Nor would it have been reasonable to limit the search warrant only to documents from specific dates and periods of time. The employee stated to the affiant that defendant had bought stolen property and integrated it into his inventory so many times during the employee's seven years of employment that he could not estimate the number of occasions. Under these circumstances, it would not be reasonable to identify every instance where a specific illegal purchase took place. **See State v. Kornegay**, 313 N.C. 1, 326 S.E.2d 881 (1985) (unreasonable to believe bookkeeper informant could recall and identify each document in longstanding fraud scheme).

Defendant relies on cases that have held that all business records may not be seized unless there is probable cause to believe the entire business is a criminal enterprise. **See, e.g., Williams v. Kunze**, 806 F.2d 594 (5th Cir. 1986); **United States v. Kail**, 804 F.2d 441 (8th Cir. 1986); **Voss v. Bergsgaard**, 774 F.2d 402 (10th Cir. 1985); **United States v. Hershenow**, 680 F.2d 847 (1st Cir. 1982); **United States v. Roche**, 614 F.2d 6 (1st Cir. 1980). Since the search warrant does not authorize seizure of all of Chaveroo's business records, defendant's reliance on these cases is misplaced. As noted by the state, the search warrant was restricted as to the records to be seized, and did not permit seizure of other records dealing with matters such as personnel, payroll, taxes, insurance, worker's compensation or social security. The cases cited by defendant do not apply.

We hold that the search warrant described the items to be seized with sufficient specificity, given the circumstances and nature of the criminal activity being investigated. Because of the complexity of the illegal scheme, we apply the particularity requirement with a practical margin of flexibility, taking into account the manner in which defendant allegedly set up the scheme and the nature of the seized items. Our holding accords with cases that have considered similar search warrants. **See, e.g., United States v. Sawyer**, 799 F.2d 1494 (11th Cir. 1986), **cert. denied sub nom.**, ___ U.S. ___, 93 L.Ed.2d 826, 107 S.Ct. 961 (1987); **United States v. Wuagneux; United States v. Timpani**, 665 F.2d 1 (1st Cir. 1981); State v. Hughes, 433 So.2d 88 (La. 1983).

Defendant vigorously contends the state failed to preserve for review the argument that the complexity of defendant's criminal activity precluded a more narrow search warrant being drawn. **See G.M. Shupe, Inc. v. Bureau of Revenue**, 89 N.M. 265, 550 P.2d 277 (Ct. App. 1976) (arguments not made below will not be considered on appeal). We reject this contention. The prosecutor argued below that the seizures were justified by the affidavit, which included the confession of the roustabout who sold the goods to defendant, as well as the statements of the employee. That is the argument the state makes on appeal.

For the reasons stated above, we hold that the search warrant in the present case was supported by probable cause and the description of the property to be seized pursuant to the search warrant was sufficiently specific to satisfy the particularity requirement. Accordingly, we

reverse the district court's order finding the search warrant to be a general search warrant and suppressing the evidence seized under it.

IT IS SO ORDERED.
WILLIAM W. BIVINS, Judge

WE CONCUR:
LORENZO F. GARCIA, Judge
RUDY S. APODACA, Judge

EXHIBIT B:

ORDER OF NEW MEXICO SUPREME COURT DENYING PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Tuesday, August 9, 1988

No. 17,847

EARL JONES,
Petitioner,
vs.
STATE OF NEW MEXICO,
Respondent.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 10348 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

EXHIBIT C:

ORDER OF NEW MEXICO SUPREME COURT DENYING MOTION FOR REHEARING

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Friday, August 26, 1988

No. 17,847

EARL JONES,
Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

This matter coming on for consideration by the Court upon Motion for rehearing of order denying petition for writ of certiorari, and the Court having considered said motion and being sufficiently advised;

NOW, THERFORE, IT IS ORDERED that the Motion for rehearing of order denying petition for writ of certiorari is hereby denied.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

EXHIBIT D:

SEARCH WARRANT AND RETURN

STATE OF NEW MEXICO

Magistrate Criminal Rule 13

MAGISTRATE COURT

_____ COUNTY _____
Number

STATE OF NEW MEXICO

v.

_____
Defendant(s)

SEARCH WARRANT

THE STATE OF NEW MEXICO TO ANY OFFICER AUTHORIZED TO EXECUTE THIS WARRANT:

Proof by Affidavit for Search Warrant, having been submitted to me, I am satisfied that there is probable cause that the person named or property described in the affidavit is located where alleged in the Affidavit and I find the ground exist for the issuance of the Search Warrant. A copy of the Affidavit is attached and made a part of this Warrant.

YOU ARE HEREBY COMMANDED to search forthwith the person or place described in the Affidavit between the hours of 6:00 a.m. and 10:00 p.m., unless I have specifically authorized a nighttime search, for the person or property described in the Affidavit, serving this Warrant together with a copy of the Affidavit, and making the search and if the person or property be found there, to seize the person or the property and hold for safekeeping until further order of the Court.

You are further directed to prepare a written inventory of any person or property seized. You are further directed to file the return and written inventory with the Court promptly after its execution.

Vickey A. Flemmans
Judge

_____
Date

AUTHORIZATION FOR NIGHTTIME SEARCH

I further find that reasonable cause has been shown for nighttime execution of this Warrant. I authorize execution of this Warrant at any time of the day or night for the following reasons:_____

(set forth reasons why a nighttime search is necessary)

_____
Judge

White–Court Copy
Yellow–Defendant's Copy
Pink–Service Copy

Approved: Supreme Court, October 1, 1974; amended October 1, 1976 and July 1, 1980.
Criminal Form 2.50-(1 of 2 pages)

RETURN AND INVENTORY

I received the attached Search Warrant on 18th of May, 1987, and executed it on 18 May, 1987, at 4:00 o'clock (p.m.). I searched the person or premises described in the Warrant and I left a copy of the Warrant with EARL JONES (*name the person searched or owner at the*

place of the search) together with a copy of the inventory for the items seized.

The following is an inventory of property taken pursuant to the Warrant: *(Attach separate inventory if necessary.)*

3 GRAY METAL BOXES CONTAINING INVENTORY CARDS OF CHAVEROO SUPPLY, INC. LARGE WHITE BOX CONTAINING 1985 - 1986 ACCOUNTS PAYABLE, RECEIVABLE, & CANCELLED CHECKS. 1 STYLE SS POST BINDER CONTAINING CANCELLED CHECKS, LOOSE MISC APRIL & MAY 1987 CHECKS. (ILLEGIBLE) SHEETS OF PAPER MISC MATERIALS PRICES & TRANSACTIONS, WITH MISC LOOSE INVOICES, 1 SCRATCH PAD BULLDOG (ILLEGIBLE), 1 BANK STATEMENT FROM LIBERTY NATIONAL BANK UNOPENED

This inventory was made in the presence of Tom J. Peveler *(name of applicant for the search warrant)*

and Earl Jones (Illegible) *(name of owner of premises or property. If not available, name of other credible person witnessing the inventory.)*

This inventory is a true and detailed account of all the property taken pursuant to the Warrant.

/s/ Tom J. Peveler, Undersheriff
Signature of Officer

/s/ Earl L. Jones
Signature of owner of property
or other witness

Return made this ___ day of ___, 19___, at (a.m.)(p.m.)

_____
(Judge)(Clerk)

After careful search I could not find at the place, or on the person described, the property described in this Warrant.

_____ _____

Date Officer

White–Court Copy
Yellow–Defendant's Copy
Pink–Service Copy

Approved: Supreme Court, October 1, 1974; amended October 1, 1976 and July 1, 1980.
Criminal Form 2.50

EXHIBIT E:

AFFIDAVIT FOR SEARCH WARRANT

STATE OF NEW MEXICO

Magistrate Criminal Rule 13

MAGISTRATE COURT
LEA COUNTY
STATE OF NEW MEXICO
v.
Earl Jones
Defendant(s)

_____
Number

AFFIDAVIT FOR SEARCH WARRANT

Affiant, being duly sworn, upon his oath, states that I have reason to believe that on the following described premises or person of (here name person and/or describe premises)

Chaveroo Supply Company, Inc at 1418 W. Broadway, Tatum, New Mexico in Lea County and the residence of Earl Jones as follows:

(See Attachment A)

in the city or county designated above there is now being concealed (set forth name of person or describe property as particularly as possible)

Chaveroo Supply invoices, inventory cards, check-books, bank records to include cancelled checks, and any other records that show items bought or sold in the operation of Chaveroo Supply Company

and that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: (include facts in support of the credibility of any hearsay relied upon; if necessary, continue on reverse side of this form or on a separate page or pages)

That on 11 May 1987 affiant was contacted by Chief Les Dudley of the Tatum Police Department and advised that Dudley had received information from a Tatum resident that Nicolas Jiminez, an employee of Gandy Corporation, had sold a quantity of oil field connections to Earl Jones at Chaveroo Supply Company in Tatum on or about 9 May 1987.

(continued on page 2)

Subscribed and sworn to or declared and affirmed to before me in the above named county of the State of New Mexico this 18th day of May, 1987.

/s/ Vickey A. Flemmans
Judge, Notary or Other Officer
Authorized to Administer Oaths

Magistrate, Lea I
Office Title

/s/ Tom Lee Peveler
Signature of Affiant
Undersheriff, Lea County
Official Title (if any)

NOTE: This affidavit shall be filed in the same file as the search warrant. If no criminal proceedings are filed, the affidavit and warrant shall be filed in a miscellaneous file.

White–Goes with Search Warrant; return to Court
Yellow–Defendant's copy
Pink–Court copy

Approved: Supreme Court, July 1, 1980.
Criminal Form 2.40

That Nicolas Jiminez is a roustabout gang pusher for Gandy Corporation and works under contract at Phillips Petroleum Company in Buckeye.

That the connections sold by Jiminez were new condition with retail value of $11,556.21 and that he received $1,290.00 in payment for them in the form of a check issued by Earl Jones. The amount received by Jiminez is 11% of retail value.

That Earl Jones is in the oil field supply business and knows the value of new connections. The fact that he paid on 11% of resale to a person that would not in the normal course of affairs as roustabout, own a large quantity of new oil field connections indicates he knew they were stolen.

That Nicolas Jiminez after being advised of his constitutional rights in English & Spanish did admit to affiant in front of witnesses that he did steal above mentioned connections from Phillips Petroleum Company at Buckeye.

That Nicolas in a tape recorded admission of larceny stated he believed Earl Jones knew the connections were stolen because of the small amount of money Jones paid him in comparison to the true value of the connections.

That the Tatum resident who started the investigation is an employee of the Chaveroo Supply Company for the past 7 years and saw a list in the handwriting of Earl Jones of the connections purchased from Jiminez. This list showed retail value, wholesale value, and the amount he paid to obtain the connections. This Chaveroo Supply

employee made a photostatic copy of this list and turned it over to affiant.

That the Chaveroo Supply employee stated the connections were placed into new stock and posted into company inventory cards by Earl Jones. He further stated that items purchased in this manner or traded for would be entered into the inventory cards with the date received, description of item, and quantity with red ink. He stated that it was not unusual for a bundle of gloves to be traded to a roustabout for connections. A bundle of gloves is worth $9.00 and would be traded even for connections worth over $100.00. He stated that in contrast, items aquired through legitimate sources would be entered into the inventory cards with black ink and would have a purchase order number or invoice number on the card. The entire inventory of the business is handwritten on the cards.

That the same employee stated to affiant that in the 7 years he had been working for Chaveroo Supply Company Earl Jones had purchased stolen oil field connections so many times from different sources that he could not even estimate the number of occasions, that there had been several purchases in the year of 1987.

This employee stated a large number of the inventory cards would be posted with the illegal purchases in red ink and that it would be difficult for Mr. Jones to alter all of them even though Mr. Jones is aware the investigation is in progress. This employee states Mr. Earl Jones has been engaged in a continuing criminal enterprise for at least 7 years.

The Chaveroo Supply Company employee states that Earl Jones had made statements to him that no one could ever prove he bought stolen merchandise because no one knew how his business was set up and could not prove anything due to that fact.

This same employee states that he feels Earl Jones might remove and hide some of the inventory cards from the business but would not destroy them because they are mixed up with the legitimate portion of the business to the extent if they were destroyed he would lose complete track of the store inventory.

That this same Chaveroo Supply Company employee has made a tape recorded statement to affiant and is willing to testify in a court of law to any and all knowledge of long term ongoing purchases of stolen oil field property.

That all of the above incidents did happen in Lea County, New Mexico.

That based on the taped admission of larceny by Nicolas Jiminez and the taped statement of Chaveroo Supply Company employee a search warrant for these business records indicated above are necessary to complete the investigation into illegal activity of Earl Jones and Chaveroo Supply Company, Inc.

SUBSCRIBED AND SWORN TO BEFORE
ME THIS THE 18th DAY OF MAY, 1987

/s/ Vickey A. Flemmans
MAGISTRATE, LEA COUNTY, DIV. I

Tom Lee Peveler

/s/ Tom Lee Peveler
Undersheriff, Lea County

ATTACHMENT A to Affidavit for Search Warrant - Earl Jones

Description of Earl Jones Residence as follows:

residence 7/10 mile south of US Highway 180 on Lea County Road C150. The residence faces west. The structure is of brick with a light brown shingle roof. A fireplace chimney is located on the east side of the residence. This structureis the third residential structure south of US 380 on the east side of C150. There is also a tan colored block building on the premises.

Search warrant requested to cover all structures on the premises.

SUBSCRIBED AND SWORN TO BEFORE
ME THIS THE 18th DAY OF MAY, 1987

/s/ Vickey A. Flemmans
MAGISTRATE, LEA COUNTY, DIV. I

/s/ Tom Lee Peveler
TOM LEE PEVELER

Undersheriff, Lea County

EXHIBIT F:

TRIAL COURT ORDER SUPPRESSING EVIDENCE SEIZED PURSUANT TO SEARCH WARRANT

IN THE DISTRICT COURT OF LEA COUNTY
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff,

vs. NO. CR87-203

EARL JONES,
Defendant.

ORDER

This matter having come on for hearing on the Defendant, Earl Jones', Motion to Supress the Evidence pursuant to an invalid warrant and the Court having considered the Warrant and the Law finds:

That the Search Warrant issued was a General Warrant in violation of the Fourth Amendment of the Constitution of the United States and all items seized thereto are hereby surpressed.

/s/ Patrick J. Francoeur
PATRICK J. FRANCOEUR
District Judge